

WHAT'S *DOBBS* GOT TO DO WITH IT? PREGNANCY-RELATED PROSECUTIONS IN A POST- *ROE* WORLD

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In September 2024, alongside our colleagues at Pregnancy Justice, we published a report entitled *Pregnancy as a Crime: A Preliminary Report on the First Year After Dobbs*. The report documents the filing of at least 210 pregnancy-related prosecutions against pregnant people in the first year after *Dobbs*,¹ twenty-two of

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¹Although we are listed as the authors of that report, we want to acknowledge that the research that led to that report was the product of a collaboration with both Pregnancy Justice and researchers across the country. The Pregnancy Justice team includes Lourdes A. Rivera, President, Dana Sussman, Senior Vice President, Fikayo Walter-Johnson, Senior Research Associate, Michele Ko, Project Manager, and Imaan Khasru, Research Assistant. Sarah Castillo, a PhD student in Sociology at the University of Tennessee, and Laurel Beaty conducted data analysis. Researchers and students at several other universities have worked on the team, locating and analyzing state level data. State level teams in Texas and Alabama worked diligently on collecting cases relevant to the study. The Texas research team is from the University of Texas School of Law's Sissy Farenthold Reproductive Justice Defense Project at the Rapoport Center for Human Rights and Justice. The team was led by Cristina I. Ramirez, the Project's Criminal Defense Lead, and Blake Rocap, Project Director. Professor Brittany VandeBerg leads our team at the University of Alabama. Students from multiple institutions also worked on this project. They include, at the University of Tennessee: Martha Schull, Ashlyn Doane, Olutayo Alston, Shayla Stewart, Natalia Lewis, Han Lemberg, at the University of South Carolina: Peyton Little, Izabella Forero, Nicole Lane, Briana Padilla, at the University of

which involved a fetal or infant demise. We have since published updated preliminary data documenting 102 additional prosecutions in the first two years after *Dobbs*, for a total of 412 pregnancy-related prosecutions after *Dobbs*.² In the weeks after the report's release, the most frequent questions reporters asked us were about *Dobbs*. Virtually every reporter wanted to know if these prosecutions were “because of” *Dobbs*. In other words, they wanted to know if the *Dobbs* ruling resulted in an escalation of pregnancy-related prosecutions.

Dobbs resulted in extraordinary harm, but the technical legal answer to reporters' questions is no. Pregnancy-related prosecutions have been brought against pregnant people for decades. A variety of reporters, researchers, and organizations have documented these pregnancy-related prosecutions. To date, these efforts provide evidence of more than 2,200 prosecutions filed since 1973.³ Our ongoing study—exploring these prosecutions in the three years post-*Dobbs*—continues to identify additional cases. These prosecutions are filed regardless of the pregnancy outcome or health of the resulting newborn.⁴ Importantly, our report explains that pregnancy criminalization primarily operates outside the realm of abortion law,

Alabama: Lonni Moorer, Jamaya Kelley, at the University of Texas Austin: Amy J. Johnson, Gwynn Marotta.

² *Post-Dobbs Pregnancy Criminal Cases*, PREGNANCY JUST., <https://www.pregnancyjusticeus.org/post-dobbs-pregnancy-criminalization/> [https://perma.cc/LA4J-42YC] [hereinafter *Post-Dobbs Criminal Cases*].

³ This number is calculated to include the 1,396 cases documented by Pregnancy Justice in 2022, spanning cases filed between 2006 and 2022, the 412 cases documented in our own study, WENDY A. BACH & MADALYN K. WASILCZUK, PREGNANCY AS A CRIME: A PRELIMINARY REPORT ON THE FIRST YEAR AFTER *DOBBS* (Sept. 2024), <https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Pregnancy-as-a-Crime.pdf> [https://perma.cc/C4QG-QAUB], the data for which is found on the pregnancy justice website, *Pre-Dobbs Pregnancy Criminal Cases*, PREGNANCY JUST., <https://www.pregnancyjusticeus.org/pre-dobbs-pregnancy-criminalization/> [https://perma.cc/Q7JR-43UL], and the 413 cases documented by Lynn Paltrow and Jeanne Flavin, filed between 1973 and 2005. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L. 299 (2013). It is important to note that a variety of reporters and researchers contributed significantly to documenting, in particular, prosecutions brought between 2006 and 2022, and that many of these efforts contributed to the work of Pregnancy Justice. Included in that work are the following reports and publications: LAURA HUSS, FARAH DIAZ-TELLO & GOLEEN SAMARI, *IF/WHEN/HOW, SELF-CARE CRIMINALIZED: THE CRIMINALIZATION OF SELF-MANAGED ABORTION FROM 2000 TO 2020* (2023), <https://ifwhenhow.org/wp-content/uploads/2023/10/Self-Care-Criminalized-2023-Report.pdf>; Anna Wolfe, *They Were Prosecuted for Using Drugs While Pregnant. But it May Not Have Been a Crime*, MISS. TODAY (Nov. 16, 2023), <https://mississippitoday.org/2023/11/16/mississippi-pregnant-women-drugs/>; Nina Martin, *Take a Valium, Lose Your Kids*, PROPUBLICA (Sept. 15, 2015), <https://www.propublica.org/article/when-the-womb-is-a-crime-scene> [https://perma.cc/29F5-S5JF]; Cary Aspinwall et al., *They Lost Their Pregnancies. Then Prosecutors Sent Them to Prison*, THE MARSHALL PROJECT (Sept. 1, 2022), <https://www.themarshallproject.org/2022/09/01/they-lost-their-pregnancies-then-prosecutors-sent-them-to-prison>; WENDY A. BACH, *PROSECUTING POVERTY, CRIMINALIZING CARE* (2022); and GRACE E. HOWARD, *THE PREGNANCY POLICE: CONCEIVING CRIME, ARRESTING PERSONHOOD* (2024).

⁴ BACH & WASILCZUK, *supra* note 3, at 13 (categorizing the pregnancy-related charges in the study as falling into six categories: child abuse/neglect/endangerment, homicide, abortion-related crimes, drug-related crimes, and abuse of a corpse).

which primarily criminalizes providers. Indeed, only one of the 412 prosecutions we have documented was brought under a criminal abortion statute.

While the holding in *Dobbs* is not necessary to support such prosecutions, there is no doubt that it bolstered the legal architecture and social movements that undergird them. Pregnancy-related prosecutions rely on a conception of fetal personhood tied to the anti-abortion movement that continues to gain strength today.⁵ The legal architecture supporting these prosecutions is intimately tied to the movement, waged in the decades before *Dobbs* and built on today, to instantiate fetal personhood in the law. It was the success of that movement, and not *Dobbs*, that created the legal architecture that underlies the prosecutions. As we said to reporters over and over again, in a world in which the law recognizes fetal personhood, prosecutors do not need the crime of criminal abortion to prosecute pregnancy-related crimes.

Unsurprisingly, these answers did not satisfy the reporters, and quite frankly, they did not really satisfy us. *Dobbs*, in the cultural ideas it abandoned and the world it licensed, does affect what we are studying. *Roe* and its progeny endorsed, however weakly, the principle that the bodily autonomy of pregnant people was, at least in some circumstances, paramount over whatever purported interest society had in that pregnancy. *Dobbs* abandoned that principle. After *Dobbs* there is no constitutional bar, at least grounded in the right to privacy, to accuse a pregnant person of a crime committed against her pregnancy based on her conduct during pregnancy. She is, in this sense, transformed from a person who holds rights to autonomy with respect to her body and her pregnancy into a potential perpetrator, ever more suspected of committing a crime against her own pregnancy. It is this shift, both legal and cultural, that matters after *Dobbs*.

This essay explores the legal architecture and growth of these ideas, both after *Roe* and after *Dobbs*, in three parts. It argues that, in an era in which suspicion about pregnancy loss seems to be growing, prosecutions involving pregnancy that target pregnant women may be on the rise, and law enforcement and prosecutors hold the tools they need to charge pregnant women with these crimes. Part I starts with the numbers and the history, summarizing what we know about these prosecutions since 1973. Part II turns to the idea of prosecuting pregnancy-related conduct, drawing a conceptual map underlying these prosecutions and tracing their legal basis. Part III turns to our preliminary data regarding prosecutions involving allegations related to fetal or infant demise and describes why we suspect that prosecuting pregnancy loss is on the rise after *Dobbs*.

I. PREGNANCY-RELATED PROSECUTIONS: HISTORY AND NUMBERS

Pregnancy criminalization occurs, “when the state wields a criminal law to render acts associated with a pregnancy, pregnancy loss, birth and/or associated

⁵ PREGNANCY JUST., UNPACKING FETAL PERSONHOOD: THE RADICAL TOOL THAT UNDERMINES REPRODUCTIVE JUSTICE 4 (Sept. 2024), <https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Fetal-personhood.pdf>; see generally MARY ZIEGLER, PERSONHOOD: THE NEW CIVIL WAR OVER REPRODUCTION (2025).

healthcare the subject of criminal prosecution.”⁶ This definition, which guides our study, encompasses actual criminalization—prosecutions that have already been initiated—and potential criminalization—statutes that have not yet been charged but are on the books. Since *Dobbs*, a wide range of states have enacted or authorized laws that criminalize the provision of an abortion.⁷ To date, however, very few states have brought charges under those statutes.⁸ In contrast, prosecutors have long prosecuted pregnant people for pregnancy-related conduct using criminal laws enacted for other purposes.

Our study aims to identify cases of pregnancy-related prosecutions between June 24, 2022, and June 23, 2025. Cases are eligible for inclusion if the criminal charges include allegations related to a pregnancy, pregnancy loss, birth, and/or associated healthcare *and* the state argues that those allegations meet an element of the relevant criminal offense. We refer to these prosecutions as “pregnancy-related prosecutions.” Using criminal charging and investigation documents, to date we have identified 412 cases in the first two study years. As data collection is ongoing—both with respect to case identification and records acquisition—this does not represent a final count for these years.

Pregnancy-related prosecutions take many forms. Some are brought under statutes that specifically target pregnancy-related conduct or events. Prosecutions brought under criminal abortion statutes or laws criminalizing feticide, for example, charge conduct that is, on the face of the statute, related to pregnancy, pregnancy outcome, birth, and/or associated healthcare. But most pregnancy-related prosecutions are brought under general criminal laws that are more often charged outside the context of pregnancy. In such cases, police and prosecutors argue that pregnancy-related conduct meets an element of a general criminal offense. These charges tend to fall into three categories: offenses against children alleging substance use during pregnancy, homicide, or various crimes concerning either the handling of human remains or the reporting of birth or death.

Prosecutions charging women for using illegal (or sometimes legal) substances during pregnancy are the most common. Almost all such cases charge some form of child abuse, neglect, or endangerment. In the first two years after *Dobbs*, for example, prosecutors in Alabama brought 191 prosecutions charging a pregnant person with chemical endangerment of a minor due to alleged substance use during pregnancy, which the state argued endangered or harmed the fetus. Likewise, Oklahoma brought at least 112 prosecutions charging child neglect based on allegations of substance use during pregnancy over the same period. Child abuse, neglect, or endangerment charges comprise the overwhelming majority of documented pregnancy-related prosecutions both before and after *Dobbs*. Of the 441

⁶ BACH & WASILCZUK, *supra* note 3, at 5.

⁷ See *After Roe Fell: Abortion Laws by State*, CTR. FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/maps/abortion-laws-by-state/> [https://perma.cc/S6DM-ECTW].

⁸ To date, only Texas and Louisiana have charged people under abortion statutes. See Eleanor Klibanoff, *Texas' First Abortion Arrests Stem from Monthlong Attorney General Investigation*, TEX. TRIB., <https://www.texastribune.org/2025/03/17/texas-abortion-midwife-arrested/> (Mar. 20, 2025); Lorena O'Neil, *Louisiana Mother, New York Doctor Indicted for Allegedly Giving Minor Abortion Pills*, LA. ILLUMINATOR (Jan. 31, 2025), <https://lailluminator.com/2025/01/31/louisiana-abortion-2/>.

charges documented in the study to date, 398 are charges in this category.⁹ While most of these cases charge offenses against children, some prosecutors use other theories to target the same alleged conduct. Prosecutors in Ohio, for example, turn to their drug crime statutes and charge individuals with “corrupting another with drugs” based on similar allegations.¹⁰

The second notable category of cases charges some form of homicide. While most cases in the child abuse/neglect/endangerment category involve a live birth, homicide cases fall into three basic subcategories. The first includes cases resulting in a pregnancy loss that prosecutors allege was the result of pregnancy-related conduct. For instance, prosecutors might argue that the use of a drug during pregnancy led to miscarriage or stillbirth and that the pregnant person therefore committed homicide. The second includes cases in which the prosecutors allege the pregnant person had a live birth and killed the infant while the defense argues the pregnancy resulted in a miscarriage or stillbirth. In these cases, whether the result was a live birth or pregnancy loss, the state asserts that some conduct by the pregnant person led to the eventual fetal or infant demise. The final category of cases includes those in which the parties agree that the infant was born alive and subsequently died, but prosecutors maintain that the pregnant person caused the death because of conduct during pregnancy or birth.

In a third small but important category of cases, prosecutors charge pregnant people for improperly handling human remains, evidence tampering, or a failure to comply with statutes governing the reporting of a birth or death. Sometimes prosecutors bring these charges upon discovery of fetal remains when the state lacks sufficient evidence to determine the cause of the demise. Other times, the state agrees the pregnancy ended in a miscarriage or stillbirth but argues the pregnant person dealt with the aftermath of their loss in a criminal manner—by failing to report the death or by not disposing of the remains as deemed appropriate by law enforcement. Lawyers defending these cases report that prosecutors may later bring a subsequent charge on the theory that the pregnant person did something that caused the fetal demise.

Pregnancy-related prosecutions have always targeted marginalized women. In our current data set, 315 of the 412 cases prosecuted low-income pregnant people. Historically, poor Black women disproportionately bore the brunt of these prosecutions, owing in large part to the crack cocaine hysteria of the 1980s and

⁹ The 412 pregnancy-related prosecutions we identified in the first two years after *Dobbs* charged 441 separate pregnancy-related charges. Where cases also charged non-pregnancy-related charges, that is, charges that do not include allegations related to a pregnancy, pregnancy loss, birth, and/or associated healthcare in which the state argues that those allegations meet an element of the relevant criminal offense, those charges are not included. Non-pregnancy-related charges prosecuted in the same case as pregnancy-related charges may include charges such as drug possession or possession of drug paraphernalia. *Post-Dobbs Criminal Cases*, *supra* note 2.

¹⁰ OHIO REV. CODE ANN. § 2925.03(a)(3). These prosecutions exist despite consistent decisions, in Ohio’s intermediate appellate courts that the statute “applies when an offender administers or furnishes a controlled substance to a pregnant woman when the pregnant woman is a person other than the offender.” *State v. Hollingshead*, 214 N.E.3d 1233, 1243 (Ohio Ct. App. 2023); *State v. Clemons*, 996 N.E.2d 507 (Ohio Ct. App. 2013); *State v. Bales*, No. 13CA5, 2013 WL 6002041, at *3 (Ohio Ct. App. Oct. 31, 2013).

1990s.¹¹ The racialized logics that undergirded the punitive state response to Black women who used substances during pregnancy, argues Khiara Bridges, entrenched a racist precedent into state responses to address substance use during pregnancy.¹² The laws, policies, and clinical practices from this era, what Bridges refers to as “first generation prosecutions,” now shape the response to the newest drug scare— involving opioids and methamphetamines—which predominately affects white communities.¹³ In this way, today’s prosecutions draw poor white women into the State’s war on drugs. These trends are reflected in our preliminary dataset. Of the 382 individuals whose criminal court files contained reported race, 280 were white, sixty-three were Black, nineteen were American Indian or Native American, nineteen were Hispanic, and one was non-Hispanic and multiracial.¹⁴

II. CONCEPTUAL AND LEGAL UNDERPINNINGS

Leaving aside for a moment the cases that charge only a form of evidence tampering, mishandling of human remains, or failure to report,¹⁵ to prove a pregnancy-related charge against a pregnant individual, prosecutors need a legal basis to establish that the fetus can be a victim of a crime (the corollary of which is that the pregnant body can be the scene of a crime) and that the perpetrator of that

¹¹ Paltrow & Flavin, *supra* note 3, at 299; LAURA E. GOMEZ, *MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE* (1997); Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381 (2008).

¹² Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 823 (2020).

¹³ *Id.* at 823. See Michael L. Barnett et al., *Racial Inequality in Receipt of Medications for Opioid Use Disorder*, 388 NEW ENGLAND J. MED. 1779 (2023); BACH, *supra* note 3; Beth Han et al., *Methamphetamine Use, Methamphetamine Use Disorder, and Associated Overdose Deaths Among US Adults*, 78 JAMA PSYCHIATRY 1329; Beth Han et al., *Racial and Ethnic Disparities in Drug Overdose Deaths in the US During the COVID-19 Pandemic*, 5 JAMA NETWORK OPEN e2232314 (2022).

¹⁴ Racial demographic data drawn from court and incarceration records are notoriously unreliable. See NANCY RODRIGUEZ & REBECCA TUBLITZ, *UCI SCH. SOC. ECOLOGY, EXPLORING LATINO/A REPRESENTATION IN LOCAL CRIMINAL JUSTICE SYSTEMS: A REVIEW OF DATA COLLECTION PRACTICES AND SYSTEMS-INVOLVEMENT* 6 (Mar. 2023), https://socialecology.uci.edu/sites/default/files/users/mkcruz/sjc_latinos_in_cjs_march_2023.pdf [<https://perma.cc/6R2J-ANEF>] (finding that criminal justice systems do not consistently keep data about Hispanic/Latino/a ethnicity); Amie M. Schuck et al., *The “Invisible” Hispanic? The Representation of Hispanics in Criminal Justice Research: What Do We Know and Where Should We Go?*, 2 J. ETHNICITY CRIM. JUST., no. 3, 2004, at 5, 8 (noting that one reason for the relative lack of research on Hispanics, Asians, and Native Americans in criminal justice is a lack of data); MICHAEL L. WALKER, *INDEFINITE: DOING TIME IN JAIL* 52 (2022) (explaining that correctional officers often categorization incarcerated people by race based on appearance rather than self-identification); Ayobami Laniyonu & Samuel T. Donahue, *Effect of Racial Misclassification in Police Data Estimates of Racial Disparities*, 61 CRIMINOLOGY 295, 296 (2022) (demonstrating that a mismatch between racial self-identification and officer-identification can bias estimates of racial disparities in policing data).

¹⁵ These charges are relatively rare. For example, in the current data set of 441 documented pregnancy-related charges filed against 412 defendants after *Dobbs* only seven proceeded under statutes concerning the handling of human remains. An additional seven charged other conduct such as evidence tampering. *Post-Dobbs Criminal Cases*, *supra* note 2.

crime can be the person carrying that pregnancy. Largely due to the longstanding efforts of the antiabortion movement, these ideas existed before *Dobbs*. The section briefly discusses the history of each of these legal concepts in turn.

A. *The Fetus as a Crime Victim and the Body as a Crime Scene*

The idea of the fetus as a victim of crime is part of the larger project to establish that the “fetus is a separate, unique human individual from the moment of conception, and . . . because of that biological and moral uniqueness, the Constitution gives (or at least should give) that individual rights.”¹⁶ In the late twentieth century, the idea of the fetus as a crime victim found its strongest foothold in a combination of state statutory reforms and novel prosecutions. As to state statutory reforms, in the 1980s, advocates associated with the anti-abortion movement worked to pass statutes that explicitly criminalized acts that harmed a pregnancy. Principle among these efforts were state-based campaigns to create the crime of fetal homicide.¹⁷ This crime, which now exists in various forms in thirty-eight states, allows prosecutors to bring homicide charges when an individual’s conduct results in a pregnancy loss.¹⁸

The idea of fetal crime victimhood also existed before *Dobbs* in criminal statutes other than those involving feticide, including in abortion statutes that criminalized abortions performed in contravention of state law. While *Roe* and its progeny protected the fundamental right to an abortion, those cases authorized a variety of restrictions on the procedure, including bans on the provision of the procedure after a certain point in pregnancy. The statutes enacting those restrictions regularly included criminal penalties for violation of those restrictions.

While statutes like feticide and criminal abortion target, on their face, conduct concerning pregnancy, these are not the only prosecution theories that depended on the idea of fetal crime victimhood. In the 1980s, while anti-abortion advocates pressed state legislatures to restrict abortion and create the crime of fetal homicide, prosecutors began filing other criminal charges against pregnant people for conduct associated with their pregnancies. These prosecutions largely targeted poor, Black Southern women who used crack cocaine during their pregnancies.¹⁹ Rather than proceeding under theories that were, on the face of the statute, about pregnancy, these prosecutors took another tack: bringing prosecutions under general child abuse or homicide statutes and pressing the argument in court that the fetus could be a victim of those crimes. The legality of these prosecutions continues to turn on questions of statutory interpretation and, specifically, on whether the relevant statute, at the time that it was written, contemplated the fetus as a victim of that crime. In three states, Oklahoma, Alabama, and South Carolina, the state supreme

¹⁶ ZIEGLER, *supra* note 5, at viii.

¹⁷ *Id.* at 91.

¹⁸ PREGNANCY JUST., THE LEGAL ASSAULT ON PREGNANT PEOPLE’S PERSONHOOD: THE RADICAL TOOL THAT UNDERMINES REPRODUCTIVE JUSTICE 10 (Sept. 2024), <https://www.pregnancyjusticeus.org/resources/unpacking-fetal-personhood/> [https://perma.cc/WC35-KNEK].

¹⁹ For a detailed history of these prosecutions, see BACH, *supra* note 3, at 47–58.

courts ultimately endorsed these theories, leading to many documented pregnancy-related prosecutions in those states.²⁰

The idea of the pregnant body as a crime scene is the logical correlate of the idea of the fetus as a potential crime victim. Here as well, the crimes of fetal homicide, criminal abortion, and other pregnancy-related prosecutions are conceptually inextricable from this idea.

B. *Pregnant Women as Perpetrators*

Prosecutions before and after *Dobbs* established the concept of the fetus as the victim of a crime and treated the pregnant body as a crime scene. The idea that the pregnant person could perpetrate that crime came into legal legibility in the post-*Roe* era through a different path. State criminal statutes that explicitly frame fetuses as crime victims—principally criminal abortion, fetal homicide, and, in some states, fetal assault²¹—often include an exclusion for the pregnant person from prosecution. For example, only Nevada currently has a criminal abortion statute that explicitly permits prosecution of a pregnant person for terminating her own pregnancy.²²

The politics of these exclusions are deeply rooted in the history of the anti-abortion movement. Some anti-abortion absolutists believe that the pregnant person should be prosecuted for having an abortion.²³ Although absolutists continue to push for state criminal abortion laws that do not exempt the abortion patient from prosecution, their view has remained on the periphery.²⁴ Instead, the movement tends to conceptualize abortion crimes as having two victims: the fetus (as is the case in crimes like fetal homicide or assault) and the pregnant person herself. Rather than attempting to convince the public that the abortion patient should be prosecuted, they framed her as someone without her own agency, misled by the purported lies of what the anti-abortion movement has called the abortion industry.²⁵ As Jolynn Dellinger and Stephanie Pell recently showed, however, such exclusions are often poorly drafted, creating opportunities for prosecutors to attempt to bring prosecutions.²⁶

The status of feticide and other assaultive offenses is more complicated. Most feticide statutes contain an exemption barring prosecution of the pregnant person for causing the demise of a fetus or embryo that she is carrying, often in the definition

²⁰ *State v. Green*, 474 P.3d 886 (Okla. Crim. App. 2020); *Ex parte Ankrom*, 152 So. 3d 397, 429 (Ala. 2013); *Whitner v. State*, 492 S.E.2d 777, 780–82 (S.C. 1997).

²¹ *See, e.g.*, GA. CODE ANN. § 16-5-28 (Assault of an unborn child); TENN. CODE ANN. § 39-13-107.

²² NEV. REV. STAT. § 200.220.

²³ Christine Fernando, *These Abortion Abolitionists Want Women Who Get Abortion [sic] to Face Criminal Charges*, ASSOCIATED PRESS (Apr. 14, 2025), <https://apnews.com/article/abortion-abolitionists-trump-roe-criminal-homicide-d6d5c7a05419fe9ded04271cb517b001> [<https://perma.cc/ALS3-MCDX>].

²⁴ *Id.*

²⁵ ZIEGLER, *supra* note 5, at 101–33.

²⁶ Jolynn Dellinger & Stephanie Pell, *Bodies of Evidence: The Criminalization of Abortion and Surveillance of Women in a Post-Dobbs World*, 19 DUKE J. CONST. L. & PUB. POL'Y 1, 25–72 (2024).

section of the homicide statute.²⁷ Take for example, Alabama’s statute, which in a definition section pertaining to homicide and assaultive offenses, states:

Nothing in Article 1 or Article 2 shall permit the prosecution of (1) any person for conduct relating to an abortion for which the consent of the pregnant woman or a person authorized by law to act on her behalf has been obtained or for which consent is implied by law or (2) any woman with respect to her unborn child.²⁸

Similar provisions exist in the majority of feticide statutes, mostly limiting feticide prosecutions to those brought against an individual other than the pregnant person. Even with respect to feticide, however, these exclusions are neither universal nor always clear. Several states are silent on the question of whether a pregnant person can be prosecuted, and some state feticide laws do not fully exclude the pregnant person.²⁹ For example, Utah defines criminal homicide as, “an act causing the death of another human being, including an unborn child at any stage of the unborn child’s development.”³⁰ While the statute states that “an actor is not guilty of criminal homicide” if “the death of the unborn child is caused by abortion” or if “a woman causes the death of her own unborn child, and the death . . . is caused by a criminally negligent act or reckless act of the woman” the same exclusion from prosecution does not apply if the “death or her unborn child” is “caused by the intentional or knowing act of the woman.”³¹

In at least one case filed after *Dobbs*, Utah prosecutors brought attempted homicide charges against a pregnant woman citing the provision of the statute that permits prosecution for intentional or knowing acts. According to the charging documents, the defendant told police that she did not want to be pregnant, that she was past the time limit for a legal abortion, and that she had engaged in a variety of acts including starving herself, drinking excessively, and driving recklessly, all in an attempt to end her pregnancy. The probable cause affidavit in the case cites the above provision of Utah law and asserts that the woman’s conduct is evidence of intentional or knowing acts.³²

In addition, to understand whether a pregnant person is actually exempt from prosecution for acts associated with pregnancy that a prosecutor believes led to an adverse pregnancy outcome, one has to look at the interaction between various state statutes and prosecutorial theories. As Dellinger and Pell ably demonstrate, “state laws that purport to exempt pregnant women from prosecution are (1) not sufficiently explicit and (2) do not necessarily prevent women from being

²⁷ For a recent summary of the status of these legal questions in state feticide statutes, see Andrew S. Murphy, *A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 IND. L.J. 847 (2019).

²⁸ ALA. CODE § 13A-6-1.

²⁹ Dellinger & Pell, *supra* note 26, at 28-30.

³⁰ UTAH CODE ANN. § 76-5-201(1)(a)(ii) (1953).

³¹ *Id.*

³² The criminal court file in this case is on file with the authors. Due to restrictions put in place by the University of Tennessee Institution Review Board, these data cannot be shared.

prosecuted under other parts of the criminal code.”³³ One clear example from our study comes from Alabama, which, as noted above, exempts the pregnant person from prosecution for feticide which can be graded as high as a class A felony. Despite the feticide exemption, prosecutors in Alabama charged six women with chemical endangerment of a minor resulting in death between June 2022 and May 2024. These charges, brought because the state alleged the women’s drug use led to their pregnancy losses, are likewise class A felonies.³⁴ One prosecutor even charged feticide in the face of the explicit exemption.³⁵

While explicitly pregnancy-focused criminal statutes often exclude pregnant women from prosecution, that is not the case for other criminal statutes. On their face, crimes like child endangerment, child abuse, and chemical endangerment of a child have nothing to do with pregnancy. It is through prosecutions based on these statutes that the idea of the pregnant person as a perpetrator of crimes against the fetus she carries has taken its strongest hold. Lynn Paltrow and Jeanne Flavin’s 2013 article provides the best evidence of pregnancy-related prosecutions in years after *Roe*.³⁶ During the study period covered by their article (1973 to 2005) only South Carolina’s supreme court had ruled that the fetus could be the victim of a non-pregnancy specific crime.³⁷ Despite the lack of legal authority in other states, Paltrow and Flavin report that

[i]n 86 percent of the cases ($n = 354$), the efforts to deprive pregnant women of their liberty occurred through the use of existing criminal statutes intended for other purposes. . . . In those cases the charges most frequently filed were child abuse or child endangerment ($n = 204$).³⁸

The trends documented by Paltrow and Flavin continue today. In our preliminary dataset, most pregnancy-related criminal charges allege violations of statutes that, on their face, have nothing to do with pregnancy. Of the 441 criminal charges filed against 412 women, 398 alleged some form of child endangerment, neglect, or abuse, sixteen charged some form of homicide, and the rest proceeded under other legal theories.³⁹ The vast majority of these cases rely on statutes that, on their face, have absolutely nothing to do with pregnancy.

³³ Dellinger & Pell, *supra* note 26, at 107.

³⁴ ALA. CODE § 26-15-3.2 (1975).

³⁵ The criminal court file in this case is on file with the authors. Due to restrictions put in place by the University of Tennessee Institution Review Board, these data cannot be shared.

³⁶ Paltrow & Flavin, *supra* note 3, at 321.

³⁷ *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997). In subsequent years, the state supreme courts in Alabama and Oklahoma would issue similar rulings. *State v. Green*, 474 P.3d 886 (Okla. Crim. App. 2020); *Ex parte Ankrom*, 152 So. 3d 397, 429 (Ala. 2013).

³⁸ Paltrow & Flavin, *supra* note 3, at 321.

³⁹ *Post-Dobbs Criminal Cases*, *supra* note 2.

III. PREGNANCY-RELATED PROSECUTIONS INVOLVING FETAL AND INFANT DEMISE—A GROWING TREND?

It should be clear at this point that long before *Dobbs*, the fetus was a legible victim of crime, the body of the pregnant person was a legible crime scene, and the pregnant person was a legible perpetrator of that crime. So what's different after *Dobbs*?

Both our data and recent events suggest the seeds of an answer. In our preliminary dataset, twenty-six cases involve charges against a pregnant person in which the state alleges that the pregnancy ended in a fetal or infant demise and the charged crime was criminal abortion, some form of child abuse or neglect, or homicide.⁴⁰ An additional five cases involved a fetal or infant demise and another charge, often alleging a crime associated with the failure to report a birth or death or the mishandling of human remains. In total, at least thirty-one women were charged with a crime after a pregnancy loss in the first two years after *Dobbs*. When compared to historical data, this number of pregnancy-related prosecutions involving a fetal or infant demise stands out. Researchers, including the authors of this essay, have identified approximately 200 cases involving a fetal or infant demise over the fifty-two year period beginning in 1973 and ending in the second year after the *Dobbs* decision.⁴¹ Between 2006 and 2022, Pregnancy Justice identified 120 cases that fit into this category, or an average of 7.5 such cases per year.⁴² The thirty-one in our study were all filed in a two-year period between June 24, 2022 and June 23, 2024, suggesting a probable increase in these cases after *Dobbs*.

There are a variety of factors that limit our collective ability to compare pre- and post-*Dobbs* data. Chief among them is the fact that our current research project has significantly more resources than any previous study. This allows us to devote far more person-power to identifying pregnancy-related prosecutions. It also affords us various tools, such as statewide data requests, that lead us to discover additional cases. For these reasons alone, we will never know if we have found so many pregnancy-related prosecutions after *Dobbs* because there are actually more cases or because we are more equipped to identify existing cases.

Despite these clear limitations, we have some reason to suspect that the enhancement of resources and methods may matter less in pregnancy-related prosecutions that involve fetal or infant demise compared to cases in which there is

⁴⁰ Five additional cases involved a fetal or infant demise but the charges in those cases alleged crimes associated with the disposal of human remains and/or failure to comply with reporting requirements concerning birth or death. *Id.*

⁴¹ This number includes 120 cases reported by Pregnancy Justice in 2020, that were coded as involving a miscarriage or stillbirth, 31 cases from our study, coded as involving a fetal or infant demise, and an additional 48 cases, documented by Lynn Paltrow and Jean Flavin, in which prosecutors filed some form of homicide charge. *See Paltrow & Flavin, supra note 3, at 311.* While the code definitions across studies varied, all of these charges appear to include an allegation of fetal or infant demise. Not included in this calculation are 61 cases of self-managed abortion, documented by if/when/how in their 2022 report. HUSS ET AL., *supra note 3 at 21.* We do not include those cases in our calculation for a variety of reasons. First, their study included cases that were investigated but not filed. Moreover, it is very possible that at least some of those 61 cases are also part of the dataset underlying Pregnancy Justice's 2022 report.

⁴² *See Paltrow & Flavin, supra note 3, at 311.*

a live birth because of the unique visibility of such cases. In prior studies of pregnancy-related prosecutions and the current one, researchers have relied on press reports, among other methods, to identify cases. This was true in Paltrow and Flavin's study, in If/When/How's study of self-managed abortion criminalization, in Grace Howard's study, and in Pregnancy Justice's 2023 report.⁴³ In our study, we also use press searches as one way to locate cases. While, particularly in Oklahoma, Alabama, and South Carolina, charges based on the use of drugs during pregnancy are tragically common, and therefore not particularly notable to the press, charges associated with an adverse pregnancy outcome seem to generate more media attention. Of the thirty-one cases described above, twenty-eight (90.3%) were reported in the press. Similarly, of the 110 cases filed between 2007 to 2023 that involved a miscarriage or stillbirth and were reported by Pregnancy Justice, 103 (93.6%) were covered in the press.⁴⁴ While we do not claim that our data are directly comparable to prior studies, given our enhanced case identification techniques, the fact remains that, across studies, the media reports on the vast majority of cases involving fetal or infant demise. This reassures us that the rise in such cases observed in our study is not due to the use of additional case identification techniques, like bulk data requests. For this reason, we believe that there may be more aggressive prosecution of these particular cases after *Dobbs*.⁴⁵

How prosecutors speak publicly about these cases is also important. In June 2025, Tom Truman, the elected prosecutor in Raleigh County, West Virginia, advised women who miscarry in his state to call 911 and report their miscarriages to the authorities. While Truman himself stated that he would not bring charges when pregnant people miscarry, he reported that other prosecutors in his state seemed willing to do so. Charging decisions, he opined, would depend on various factors. As he explained:

The kind of criminal jeopardy you face is going to depend on a lot of factors What was your intent? What did you do? How late were you in your pregnancy? Were you trying to hide something, were you just so emotionally distraught you couldn't do anything else?⁴⁶

Truman focused, in this circumstance, on the existence of criminal statutes in West Virginia that pertain to the disposal of human remains—statutes similar to those used in four of the cases involving a fetal or infant demise in our dataset.

⁴³ Paltrow & Flavin, *supra* note 3, at 302; HUSS ET AL., *supra* note 3, at 8-9; HOWARD, *supra* note 3, at 22-3; PURVAJA S. KAVATTUR ET AL., PREGNANCY JUST., THE RISE OF PREGNANCY CRIMINALIZATION: A PREGNANCY JUSTICE REPORT 54 (Sept. 2023).

⁴⁴ *Post-Dobbs Criminal Cases*, *supra* note 2.

⁴⁵ Pregnancy Justice is our research partner on the current study. This analysis was done, and this data was provided, at the authors' request. It is worth noting that one unknowable factor is the extent of press attention before and after *Dobbs*. It is certainly possible that the press has been paying more attention to this issue after *Dobbs*.

⁴⁶ *Women Who Miscarry Could Face Criminal Charges, Prosecutor Warns*, MSN.COM (June 6, 2025), <https://www.msn.com/en-us/news/crime/women-who-miscarry-could-face-criminal-charges-prosecutor-warns/ar-AA1GebDe>.

What’s notable here is the message his statement sends to pregnant people. Truman was not encouraging women who miscarry to call 911 so that they would have access to health services. Instead, in the most generous reading of his statement, he counseled women to call 911 because he wants women to understand that they may be in legal jeopardy for their pregnancy loss. This returns us squarely to the idea of the pregnant person as perpetrator. After *Dobbs*, pregnancy loss, in West Virginia and beyond, is inherently suspect, and the suspect is the pregnant person herself.

Pregnancy loss may be suspect, but it is also common. The risk of miscarriage—the spontaneous loss of a pregnancy prior to twenty weeks gestation—can range from 11% in individuals with no history of miscarriage to 42% in individuals with three or more prior miscarriages.⁴⁷ Approximately 1% of pregnancies in the United States end in stillbirth, or the loss of pregnancy at or after twenty weeks gestation.⁴⁸ Stillbirth rates are twice as high for Black women than white women in the United States,⁴⁹ and poor women “face double the risk of stillbirth compared to women with economic means.”⁵⁰ These pregnancy losses are often unpreventable.⁵¹ Even when they may be prevented, it is difficult to prove beyond a reasonable doubt the cause of any particular pregnancy loss, despite the impulse to find someone to blame for such an event.⁵²

If, as Truman suggests, every person who experiences a miscarriage or stillbirth should immediately report it to the police, whose job it is to investigate crime, and if, as we demonstrate above, the legal architecture for these prosecutions is in place, then all pregnant people are at risk for criminalization. Those who are poor and Black—more vulnerable due to systemic inequality in medical care and the criminal legal system—are most at risk. While inquiries into pregnant people’s wrongdoing related to their pregnancy losses often arise out of bias in the medical and criminal legal systems, these prosecutions are made possible by laws that view pregnancy losses as suspicious—particularly when they occur outside of hospitals. These suspicions subject such losses to coroner and medical examiner investigations,⁵³ human remains disposal requirements,⁵⁴ or reporting requirements that treat pregnancy losses in ways equivalent to other deaths,⁵⁵ creating a framework for criminal liability.

⁴⁷ Siobhan Quenby et al., *Miscarriage Matters: The Epidemiological, Physical, Psychological, and Economic Costs of Early Pregnancy Loss*, 397 LANCET 1658, 1660 (2021).

⁴⁸ April Adams et al., *Social Determinants of Health and Risk of Stillbirth in the United States*, 41 AM. J. PERINATOLOGY e477, e479 (2024).

⁴⁹ JILL WEIBER LENS, STILLBIRTH & THE LAW 6 (2025).

⁵⁰ *Id.*

⁵¹ Erin Strumpf et al., *Prevalence and Clinical, Social, and Health Care Predictors of Miscarriage*, 21 BMC PREGNANCY & CHILDBIRTH 185 (2021).

⁵² *Id.* at 187–92.

⁵³ See, e.g., 23 R.I. GEN. LAWS § 23-3-17(e); S.C. CODE ANN. § 17-5-530 (2012); S.D. CODIFIED LAWS § 34-25-32.2; TENN. CODE ANN. § 68-3-504.

⁵⁴ See, e.g., CAL. PENAL CODE § 643 (making it a misdemeanor to “dispose of fetal remains in a public or private dump, refuse, or disposal site. . . . regardless of the duration of the pregnancy”); FLA. STAT. ANN. §§ 497.005, 497.386.

⁵⁵ See, e.g., IDAHO CODE § 39-260; 18 PA. CONS. STAT. ANN. § 4303; WIS. STAT. ANN. § 948.23.

In a world after *Dobbs*, in which women have no constitutional right to bodily autonomy during pregnancy, and in a world where there are multiple legal theories that prosecutors can rely on to paint pregnant people as perpetrators of crimes against their own pregnancies, increased scrutiny of pregnancy loss becomes a gateway to investigation, leading perhaps inexorably toward more charges of the kinds described above. While our data cannot answer this question with certainty, we have reasons to suspect that these prosecutions are on the rise. *Dobbs*, it turns out, may have quite a lot to do with it.